United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

NO. 21,134

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT L. MATHIS,

APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Whether in a trial upon an indictment for false pretense, postdated checks in the amount of $800.00 and $371.00, respectively, received by appellant had a value in excess of $100.00, as required by 22 D. C. Code §1301, where the issuer stopped payment prior to said postdate.

2. Whether the instruction by the Trial Judge, that if the jury found that the complainant had executed and delivered said checks in the amount of $800.00 and $371.00, then the jury must find that said checks had a value in excess of $100.00 was error.

3. Whether error was committed by the Assignment Judge and/or the Trial Judge in denying appellant's motion for a continuance in order that he could retain counsel of his own choosing instead of being represented by Court-appointed counsel.

4. Whether in a trial upon an indictment for false pretense, the evidence adduced supported the Government's burden to prove, beyond a reasonable doubt, that the appellant was guilty of the crime charged.

5. Whether the refusal by the Trial Judge to give appellant's trial counsel's instruction that the jury should not consider any evidence introduced by the

Government in support of allegations in the indictment which had been stricken therefrom by the Trial Court with the consent of Government was error; the Trial Judge having instructed the jury that it could consider such evidence as circumstances which may or may not bear upon the truth or falsity of the remaining allegations in the indictment.

6. Whether the admission of evidence pertaining to the cost of the work to be performed by appellant and to appellant's failure to secure permits from the District of Columbia and Virginia was erroneous.

I N D E X

I N D E X

T A B L E O F C A S E S

T R E A T I S E S

S T A T U T E S

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* Cases chiefly relied upon.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,184

ROBERT L. MATHIS,

APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM JUDGMENT OF THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was convicted by a jury on May 15, 1967, for the offense of false pretense in the proceeding in the United States District Court for the District of Columbia, Honorable Joseph Waddy, presiding. On June 30, 1967, appellant was sentenced to serve for a term of from

one (1) year to three (3) years imprisonment. On the same date, Judge Waddy granted appellant's motion for leave to appeal from the Judgment and Sentence in forma pauperis.

On August 3, 1967, appellant filed a pro se petition for reduction of the sentence with Judge Waddy. On August 10, 1967, this Court remanded the case to the District Court vesting jurisdiction in Judge Waddy for the limited purpose of acting on appellant's motion. By order dated August 11, 1967, Judge Waddy reduced appellant's sentence to a term of from six (6) months to twenty-four (24) months and the case was remanded back to this Court. The jurisdiction of this Court is founded upon 28 U. S. C. A., Section 1291.

STATEMENT OF THE CASE*

On May 10, 1967, when the case was called by the Assignment Judge, appellant moved for a continuance on the ground that he had just learned that he had access to funds that he could use to retain his own personal counsel instead of being represented by Court-appointed counsel. This motion was denied and the case was assigned to Judge Waddy for trial (District of Columbia Criminal Jacket).

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* The transcript was typed by two court reporters, but the numbering of the pages of the transcript prepared by each reporter start with page 1. Accordingly, references to pages of the transcript prepared by Patrine N. Brockmeyer will be preceded by the letter "B"; and references to pages of the transcript prepared by Martha J. Maloney will be preceded by the letter "M."

Counsel is advised by Stephen Engelberg who was the Court-appointed counsel for appellant in District Court that Mr. Engelberg renewed the motion for a continuance so that appellant could retain his own counsel instead of using Court-appointed counsel which motion was denied by Judge Waddy.*

Appellant was indicted by the Grand Jury for false pretense. The indictment stated that appellant, with intent to defraud, falsely represented to Ruth M. Merwin that he was a representative of the Holland Furnace Company and Ritchie's Heating Company, that he was authorized by them to service and repair a furnace at complainant's premises, that the furnace and the chimney at the premises were in need of repair, and that the necessary repairs would be made by agents of the Holland Furnace Company and Ritchie's Heating Company. The indictment further stated that the representations were known by appellant to be false but that complainant relied upon them and delivered two checks, each dated March 2, 1964, to appellant (Indictment).

After presentation of the Government's case, the Government advised the Court that it was relying upon one alleged false representation; to wit, that the furnace and

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* The transcript of the trial proceedings does not refer to the motion, since the transcript commences with the questioning of the first witness. Counsel has moved this Court to order that the portion of the transcript referring to the renewal of the motion and the denial thereof be prepared so that it will be part of the record.

the chimney needed repairs; and the jury was so advised by the Trial Judge (M-Tr. 5-7).

The witnesses, who testified at the trial, consisted of the complainant, Ruth Merwin; and a District of Columbia plumbing inspector on behalf of the Government and appellant; his nephew, Roger Long; and an expert on behalf of appellant.

Ruth Merwin was half owner of a house situated at 2946 Newark Street, N. W., Washington, D. C. (B-Tr. 3-5). The house was fifty years old, a new Holland gas furnace had been installed by Ritchie's Heating Company in 1963, but no work was done on the chimney. In fact, no work had been done on the chimney in the last ten years (B-Tr. 22-24).

Roger Long, appellant's nephew, as an employee of Ritchie's Heating Company, worked on the installation of the new gas furnace (M-Tr. 76-77). He noticed that at the base of the bottom of the chimney there were mortar fragments and chips of terra cotta chimney lining that had fallen from the chimney (M-Tr. 25 and 77). Mr. Long felt that the chimney had to be repaired; and since his employer did not perform chimney work, he contacted appellant and advised him of the situation (M-Tr. 78).

Appellant, who had been in the heating and air conditioning business since 1953, had three employees; and forty (40) percent of his time was devoted to the installation of chimney linings. He had installed three to four

hundred chimney linings (M-Tr. 8). On May 2, 1964, he called on Mrs. Merwin at her home, tested the furnace and inspected the chimney (M-Tr. 12 and B-Tr. 8). After his investigation, appellant told complainant that the furnace was in good shape but that the chimney was leaking (B-Tr. 8 and M-Tr. 12). There were cracks and holes in the chimney, and there were soot marks by the openings which appellant showed to complainant; and since the soot came from the inside of the chimney, the chimney wall had to be leaking (M-Tr. 13-14; B-Tr. 8, 24, and 34). In appellant's opinion, it was necessary that a new chimney lining be installed (M-Tr. 14 and B-Tr. 8).

Appellant and Ruth Merwin entered into a contract whereby appellant agreed to install a chimney liner for a total amount of $1171.00. The contract also referred to a rebuilt oil burner. However, both appellant and complainant testified that the work to be done involved the installation of a chimney liner, the work on the furnace being incidental and in connection with the chimney work (B-Tr. 44; M-Tr. 15-16). Complainant didn't read the contract and said that she understood that the installation of the chimney lining was the only work involved (B-Tr. 44). The use of the word "oil" instead of "gas" in the contract was, in effect, a mistake (M-Tr. 15).

After execution of the contract on March 2, 1964, complainant delivered to appellant two checks postdated

March 7, 1964, one for $800.00 and one for $371.00 (B-Tr. 12-13). There was no testimony showing that there were funds in the complainant's bank account. Instead, complainant told appellant that there were not enough funds in the checking account to cover the checks, explaining that she would have to transfer funds from her savings account into her checking account (M-Tr. 48). Appellant advised complainant that his men would be at her home to do the work on March 3, 1964, at 7:00 a.m. Appellant's men came to do the work, but complainant changed her mind about having the work done and sent the men away. Immediately thereafter on the morning of March 3, 1964, she ordered her bank to stop payment on the checks (B-Tr. 14-15).

The Government called a District of Columbia plumbing inspector to testify, and he stated that he had inspected the furnace and the chimney and that in his opinion the chimney did not need a new chimney liner, although he admitted that some work should be performed on the chimney (M-Tr. 49). The inspector had never installed a chimney liner inside a chimney and could not answer "yes" or "no" when asked if a ten-year-old terra cotta chimney liner would begin to show some cracks (M-Tr. 51, 53, and 57). Moreover, the inspector had not noticed the holes and cracks at the base of the chimney where soot had formed on the outside (M-Tr. 54-55).

Appellant's expert who had vast experience with chimney liners testified that he had not inspected the chimney, however, he testified hypothetically that if there were indications of deterioration in the chimney, then a new chimney liner should be installed. He further stated that a ten-year-old terra cotta lining might require a replacement, especially when there was a change from an oil to a gas furnace (M-Tr. 64-65 and 74).

Despite the deletions from the indictment of all allegations relating to appellant's alleged misrepresentation as to whom he represented and as to who would do the work, the Government over appellant's objection continued on cross-examination to question appellant about these matters (M-Tr. 21, 23, 24, 26, and 33). Moreover, the Government on cross-examination brought out that appellant did not have a District of Columbia Home Improvement License nor a permit for Virginia which had no relationship to the issues involved (M-Tr. 28-31). Furthermore, the Government went to great lengths on cross-examination to show that complainant would have been overcharged if the work had been performed (M-Tr. 40-48).

The Trial Judge in his charge to the jury stated that the jury must find that the checks constituted "something of value in excess of $100.00 if it found that the two checks had been executed and delivered. Accordingly, the issue of the value of the checks was taken from the jury.

In addition, the Trial Judge denied appellant's request for an instruction which provided that the jury should not consider any evidence submitted in proof of the allegations that were stricken from the indictment (M-Tr. 93). Instead, the Trial Judge modified the instruction to the effect that such evidence could be considered by the jury as circumstances bearing upon the truth or falsity of the representations concerning the repairs to the furnace and the chimney (M-Tr. 94 and 142-143).

STATUTE INVOLVED

District of Columbia Code (1967 Edition)

"§22-1301 False Pretenses

> Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both. Any person who obtains any lodging, food, or accommodation at an inn,

boarding-house, or lodging-house, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at such an inn, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at such an inn, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, accommodation, or lodging, shall be deemed guilty of a misdemeanor, and upon conviction thereof in the District of Columbia Court of General Sessions be fined not more than $100 or imprisoned not more than six months, or both, in the discretion of said court. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, §842; June 30, 1902, 32 Stat. 535, ch. 1329; Aug. 12, 1937, 50 Stat. 628, ch. 599; Apr. 1, 1942, 56 Stat. 190, ch. 207, §1 June 29, 1953, 67 Stat. 99, ch. 159, §215(e); July 8, 1963, 77 Stat. 77, Pub. L. 88-60, §1.)"

STATEMENT OF POINTS

Appellant did not obtain any item having a value of $100.00 or upward from complainant, so that there was no violation of §22 D. C. Code 1301.

The Trial Judge's instruction that as a matter of law the two checks had a value of $100.00 or more was erroneous.

The denial of appellant's motion for a continuance so that he could retain his own personal counsel instead of Court-appointed counsel constituted reversible error.

The evidence adduced does not support the Government's burden to prove, beyond a reasonable doubt, that appellant was guilty of the crime charged.

The Trial Judge's instruction that the jury could consider any evidence introduced by the Government in support of allegations in the indictment which had been stricken therefrom as circumstances bearing upon the truth or falsity of the remaining allegations in the indictment constituted reversible error.

The admission of evidence pertaining to appellant's failure to hold a District of Columbia Home Improvement License and a Virginia Permit and to the cost of the work to be performed by appellant was erroneous.

SUMMARY OF ARGUMENT

In order for the appellant to have been convicted for false pretense under §22-1301 of the D. C. Code, the Government had to prove that appellant had obtained an asset of a value of $100.00 or more. The Government failed to meet this burden. There were two checks drawn on March 2, 1964, postdated March 7, 1964. Prior to the postdate, complainant stopped payment on the checks. Moreover, complainant did not have sufficient funds in her checking account on March 2, 1964, to honor these checks. As a matter of law, a check is not money and has no value except as an executory order calling for the payment of funds. In addition, the presumption is that a maker of a postdated check has inadequate funds in the bank at the time of issuance. A postdated check is not payable until

the postdate, and the checks in this case never became payable because the issuer stopped payment before the postdate. Clearly, in view of the above, complainant at no time had surrendered anything of value to appellant; so that the judgment must be reversed.

The Trial Judge's instruction to the jury that it had to find that the two postdated checks had a value of $100.00 or more was erroneous. As shown by the discussion above, the Trial Court should have instructed the jury that the checks never had a value of $100.00 or more. At least the issue of value should have been presented to the jury. There is the presumption of the inadequacy of funds by the maker of a postdated check; moreover, a check is not money. In addition, the only testimony on the value of the checks is to the effect that complainant did not have sufficient funds in her account at the time she issued the checks. Finally, payment on the checks was stopped by the issuer before the postdate.

The denial of appellant's motions for a continuance so that he could retain his own personal counsel instead of Court-appointed counsel was error. Under the Sixth Amendment to the Constitution, appellant was entitled to counsel; and the Courts have broadened this right to hold that a person accused of a crime should have counsel of his own choosing. In this case, the Government's only witnesses were a District of Columbia resident and a District of

Columbia employee; so that there would have been no inconvenience to the Government if the case had been continued. Appellant's right to have counsel of his own choice far outweighed any inconvenience to the Government in this particular situation and the denial of appellant's motions for continuance constituted reversible error.

The evidence adduced did not support the Government's burden to prove beyond a reasonable doubt that the appellant was guilty of false pretense. Appellant, a chimney expert, was of the opinion that complainant needed a new chimney lining. Complainant readily admitted that appellant told her that the furnace was in good condition and also admitted that he showed her soot-lined holes in the chimney, which were the bases of appellant's opinion that the chimney leaked. The only evidence to indicate that the chimney did not need a new liner was the testimony of the Government's expert witness who had never installed a chimney lining, and he had little experience with such an item. Opinions are not representations, and the evidence does not support a finding that the appellant misrepresented the condition of the chimney. Even if appellant's opinion was erroneous, there is not one shred of evidence to show that appellant intentionally intended to give an erroneous opinion.

The instruction of the Trial Judge that the jury could consider evidence introduced by the Government in

support of allegations in the indictment which had been stricken therefrom as circumstances bearing upon the truth or falsity of the remaining allegations was erroneous. Upon the striking of the allegations, any evidence introduced in support thereof was irrelevant and could only prejudice appellant.

The admission on cross-examination of the appellant by the Government of testimony relating to the value of the projected work to be done by appellant was completely irrelevant and prejudicial. The innuendo was that the complainant would have been overcharged if the work had been performed. Certainly overcharging is not a crime and had no relationship to the issues in the proceeding except to prejudice the jury against appellant.

The admission on cross-examination of the appellant of evidence relating to appellant's failure to have a District of Columbia Home Improvement License and a Virginia Permit was irrelevant and could only prejudice the jury against appellant.

ARGUMENT

I. APPELLANT DID NOT OBTAIN ANY ITEM HAVING A VALUE OF $100.00 OR UPWARD FROM COMPLAINANT SO THAT THERE WAS NO VIOLATION OF §22 D. C. CODE 1301.

With respect to Point I, appellant desires the Court to read the following pages of the reporters' transcripts: B-Tr. 13, 14-15, M-Tr. 48, 98-99, 145.

The felony of false pretense is not committed unless all of the following five elements have been proved: false representation, knowledge of falsity, intent to defraud, reliance by the defrauded party, and obtaining something of the value of $100.00 or upward. §22 D. C. Code 1301 (1967 Edition), Ciullo v. United States, 117 App. D. C. 31, 325 Fed. 2d 227. It is submitted that as a matter of law the Government failed to prove that the two postdated checks obtained by appellant had a value of $100.00 or upward.

Appellant on March 2, 1964, received two checks postdated March 7, 1964. At the time the checks were issued, the issuer did not have sufficient funds in her checking account to honor the checks. On March 3, 1964, she ordered her bank to stop payment on the checks. At the time appellant received the checks, they were just pieces of paper; since postdated checks are not payable until the postdate. §28:3 D. C. Code 114 (2) (1967 Edition). Accordingly, even if there were sufficient funds in complainant's account on March 2, 1964, the date of the issuance of the checks, the checks were still worthless. The checks never did attain any value because payment was stopped prior to the postdate.

Checks are not money and have no value except as an executory order to pay funds. United States v. Wells, 2 Cranch CC 43 (App. D. C.), Kellogg Company v. United States, 133 Fed. Supp. 387, 389, (Ct. of Cl., 1955). The presumption is that the maker of a postdated check has an inadequate fund in the bank at the time of the giving of such a check but that he will have enough at the date of presentation 10 C. J. S. 412. In this case, the payment on the checkswas stopped prior to the presentation of the checks; so that the checks never had any value.

Moreover, the Government did not introduce any evidence to rebut the presumption that there were insufficient funds in complainant's account. In fact, the only evidence introduced at the trial was the testimony of appellant on cross-examination when he stated that complainant told him she did not have enough funds in her checking account and planned to switch funds from her savings account into her checking account (I-Tr. 48).

There are cases which hold that if the person giving up an asset in reliance on a false representation is subsequently reimbursed, the crime of false pretense has still been committed because there was value obtained at the time of the misrepresentation: see Gilmore v. United States, 106 App. D. C. 344, 273 Fed. 2d 79. But this is not true in this proceeding. In the situation at

bar, appellant at no time obtained any item of the value of $100.00 or more.

Even if it could be assumed that technically the checks had some value, certainly these checks were not worth $100.00 or upward. On the basis of the evidence and the law, appellant did not obtain an item worth $100.00 or more and the District Court Judgment must be reversed.

II. THE TRIAL JUDGE'S INSTRUCTION THAT AS A MATTER OF LAW THE TWO POSTDATED CHECKS HAD A VALUE OF $100.00 OR MORE WAS ERRONEOUS.

With respect to Point II, appellant desires the Court to read the following pages of the reporters' transcripts: B-Tr. 13, 14-15; H-Tr. 48, 98-99, 145.

The Trial Judge, over appellant's objection, instructed the jury that if it found the two checks had been issued and delivered to appellant then it had to find that the checks were worth $100.00 or more. There was no basis in law or in fact for this instruction.

As a matter of law, a postdated check is not payable until the postdate. §28:3 D. C. Code 114 (2) (1967 Edition). Checks, whether postdated or not, are not money and have no value except as an executory order to pay funds. United States v. Wells, 2 Cranch CC 43 (App. D. C.), Kellogg Company v. United States, 133 Fed. Supp. 387, 389 (Ct. of Cl., 1955). The presumption is that the maker of

of a postdated check has inadequate funds at the time of the issuance of the check 10 C. J. S. 412. In this case, the presumption was not rebutted; instead, the only evidence bearing on the sufficiency of the funds in complainant's checking account shows that complainant did not have sufficient funds.

Of course, a check drawn on an account without sufficient funds is worthless. Certainly on the basis of the evidence and the law, the Trial Judge should have instructed the jury to bring in a verdict of acquittal; since the Government had not affirmatively proved that appellant had obtained anything having a value of $100.00 or more. Appellant had raised the issue of value; and, at the very least, the issue of the value of the checks should have been presented to the jury for decision.

In view of the Trial Judge's instruction, the District Court Judgment must be reversed.

III. THE DENIAL OF APPELLANT'S MOTION FOR A CONTINUANCE SO THAT HE COULD RETAIN HIS OWN COUNSEL INSTEAD OF COURT-APPOINTED COUNSEL CONSTITUTED REVERSIBLE ERROR.

With respect to Point III, appellant desires the Court to read that portion of the case jacket of the District Court proceedings relating to the Assignment Judge's denial of said motion; and in the event this Court grants appellant's

motion to have that portion of the trial transcript prepared which reflects appellant's motion for a continuance, then to read those pages.

On May 9, 1967, appellant received a telegram from his sister advising him that she would send him the necessary funds to secure his own counsel. On May 10, 1967, the following day, when the case was called by the Assignment Judge for trial, appellant moved for a continuance in order that he could secure his own personal counsel in place of Court-appointed counsel. Appellant explained that he now had a source of funds. The motion was denied, and the case was assigned to Judge Waddy for trial on the same day.

Counsel for appellant is advised by Stephen Engelberg, who was the Court-appointed counsel for appellant in the District Court, that Mr. Engelberg renewed the motion for a continuance so that appellant could secure his own counsel immediately upon the commencement of the Trial Court proceedings; but the motion was denied by Judge Waddy. The transcript that was prepared for this appeal commences with the questioning of the first witness; and, accordingly, does not reflect the motion and the denial thereof. Appellant has moved this Court to order the preparation of that portion of the transcript which refers to the motion and the denial thereof.

It is clear under the law that the accused is entitled to counsel of his own choosing. This principle is clearly enunciated by the Supreme Court in Crooker v. California, 357 U. S. 433, 437, where the Court stated:

> "The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. See 1 Cooley's Constitutional Limitations (8th ed.) 696-700; 2 Story on the Constitution (4th ed. 1873) §1794. That right, secured in state prosecutions by the Fourteenth Amendment guaranty of due process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to 'a fair opportunity to secure counsel of his own choice.' Powell v. Alabama, 287 U. S. 45, 53, 77 L. ed. 158, 162, 53 S. Ct. 55 (1932); Chandler v. Fretag, 348 U. S. 3, 99 L. ed. 4, 75 S. Ct. 1 (1954)."

In United States v. Johnston, 318 Fed. 2d 288 (6th Cir. 1963), the accused was told on a Friday that his lawyer could not represent him at his trial on the following Tuesday and suggested another lawyer. On the following Monday, the accused advised his original lawyer for the first time that he did not wish the second lawyer to represent him. At the trial, the accused stated that he did not wish to be represented by the second lawyer and wanted a different lawyer. The Government opposed a continuance on the ground that many witnesses had come to the trial from Canada. The Trial Court held that the case should proceed with the accused being represented by the substitute lawyer.

The accused was convicted and appealed on the ground that he had been deprived of the right to have counsel of his own choosing. No question was raised as to the competency of the second lawyer or his manner of conducting the trial.

The Circuit Court of Appeals reversed the Trial Court and held that the accused should have been given an opportunity to secure his own counsel, despite the great expense and trouble that the Government had undergone to assemble witnesses from great distances. The Court stated:

> "The Amendment does not concern itself with who the counsel may be or how the counsel may be selected. But if a defendant in a criminal case desires to hire his own counsel, in order that the object of the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing. Crooker v. California, 357 U. S. 433, 439, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958); Chandler v. Fretag, 348 U. S. 3, 9, 10, 75 S. Ct. 1, 99 L. Ed. 4 (1954); Glasser v. United States, 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942); Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).
>
> "Therefore, the question boils down to whether appellant Balk had fair opportunity and reasonable time to select counsel of his own choice.
>
> "While history of the case heretofore set out indicates that appellant Balk wavered to some extent as to whether he might go forward with Mr. Barris or accept Mr. Walker, we believe that the record fairly reveals that the definite position of Mr. Balk was that he desired Mr. Louisell to try his case and, if not, that he should have more time to select a lawyer that he had confidence in.

> "We are fully cognizant of the situation in which the District Judge was placed. He had to make a decision on short notice. The United States had gone to great expense and trouble in assembling witnesses from long distances and the District Judge felt, which we are sure is true, that Mr. Barris could adequately protect the interest of appellant Balk. Actually it seems to us that appellant Balk was not prejudiced by the action of the District Judge in this respect, but this situation does not satisfy appellant Balk's rights under the Sixth Amendment. Crooker v. California, supra; Chandler v. Fretag, supra; Glasser v. United States, supra; Powell v. Alabama, supra; Releford v. United States, 9 Cir., 288 F. 2d 298, 301 (1961)."

For other illustrative cases, see Releford v. United States, 288 Fed. 2d 298 (9th Cir. 1961) and United States v. Richmond, 277 Fed. 2d 702 (2nd Cir. 1960).

In the case at bar, the appellant's right to be represented by his own counsel far outweighed any inconvenience to the Government. The Government had two witnesses, one a District of Columbia employee and the other a resident of the District of Columbia; so that in reality a continuance would have caused practically no inconvenience to the Government. Appellant was not dilatory in his request for his own counsel. The day after he learned about his access to funds, he made his motion and then renewed it at the commencement of the trial.

In view of the above, the denial of appellant's motions for a continuance so that he could secure his own counsel was error.

IV. THE EVIDENCE ADDUCED DOES NOT SUPPORT THE GOVERNMENT'S BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF THE CRIME CHARGED.

With respect to Point IV, appellant desires the Court to read the following pages of the reporters' transcripts: Tr.-B 8, 15-16, 22-24, 34-35, 43-44, 51-54, 57; and Tr-M 8-9, 12-16, 39-40, 63-65, 73-75, 77-78, 84-85.

The felony of false pretense is not committed unless all of the following five elements have been affirmatively proved by the Government: false representation, knowledge of falsity, intent to defraud, reliance by the defrauded party and the obtaining of something of value of $100.00 or upward §22 D. C. Code 1301 (1967 Edition), Ciullo v. United States, 117 App. D. C. 31, 325 Fed. 2d 227.

The Government had the burden of proving, beyond a reasonable doubt, that appellant was guilty of the crime charged. This Court in Egan v. United States, 52 App. D. C. 384, 287 Fed. 958 at page 393 clearly stated this principle and defined reasonable doubt as follows:

> "The Government is by law burdened with the obligation of proving the case set out in the indictment, in every material fact, beyond a reasonable doubt; and before the jury can lawfully return a verdict of guilty, they must find that every element essential to establishing guilt has been so proven. The law demands acquittal, unless every material and necessary fact upon which a conviction depends is proven to the satisfaction of each individual juryman, beyond a reasonable doubt.

* * *

> "A reasonable doubt may be defined to mean such a doubt as will leave the juror's mind, after a candid and impartial investigation of all the evidence, so undecided that he is unable to say that he has an abiding conviction of the defendant's guilt or such a doubt as in the graver and more important transactions of life, would cause a reasonable and prudent man to hesitate and pause."

It is submitted that under the above definition the jury could not have found the appellant guilty beyond a reasonable doubt. Complainant owned a fifty-year-old house. A new gas furnace had been installed in 1963, but no work had been done on the chimney for the past ten years. The uncontradicted testimony of an employee of the Company that installed the new furnace, corroborated by appellant, shows that while the employee was installing the new furnace he had to clean out chips of terra cotta and mortar from the base of the chimney which led the employee to conclude that the chimney needed repairs. Since his company did not work on chimneys, the employee contacted appellant.

Appellant, a man of great experience, inspected the furnace and the chimney. He found holes and cracks in the mortar lined with soot, which meant there was a leak in the chimney. Complainant admitted in cross-examination that appellant showed this condition to her. Appellant recommended the installation of a new chimney liner. The

Government expert who admitted that he had not installed chimney linings conceded on cross-examination that he had not seen the soot-lined holes which formed the basis of appellant's opinion. Appellant's expert who was a chimney expert testified that a ten-year-old terra cotta chimney lining might require a replacement, especially when there was a change from an oil to a gas furnace.

This is the entire case, and it is submitted that the Government failed to meet the burden of proof required for each element of the crime of false pretense. Opinions are not representations for purposes of the False Pretense Statute; there must be the misrepresentation of an existing fact. Engle v. United States, 48 App. D. C. 466; Chaplin v. United States, 81 App. D. C. 80, 157 Fed. 2d 697. Appellant's opinion was not a false representation.

It is submitted that as a matter of law the jury could not have found knowledge of falsity or intent to defraud from the evidence presented in this case. The Court is referred to Points I and II of this brief with respect to the element of value.

In view of the above, it would appear that the Government failed to meet the burden of proof required.

V. THE TRIAL JUDGE'S INSTRUCTION THAT THE JURY COULD CONSIDER ANY EVIDENCE INTRODUCED BY THE GOVERNMENT IN SUPPORT OF ALLEGATIONS IN THE INDICTMENT WHICH HAD BEEN

STRICKEN THEREFROM AS CIRCUMSTANCES BEARING UPON THE TRUTH OR FALSITY OF THE REMAINING ALLEGATIONS IN THE INDICTMENT CONSTITUTED REVERSIBLE ERROR.

With respect to Point V, appellant desires the Court to read the following pages of the reporters' transcripts: B-Tr. 7-9, 14; and M-Tr. 5-7, 20-23, 93-94, 99, 101-102, 142-143.

The indictment among other things stated that appellant falsely represented that he was a representative of the Holland Furnace Company and Ritchie's Heating Company, that he was authorized by them to service and repair a furnace at complainant's premises and that the necessary repairs would be made by agents of the Holland Furnace Company and Ritchie's Heating Company. After presentation of the Government's case, the Government after argument by counsel for appellant advised the Court that it would not rely on these alleged misrepresentations. The Court struck them from the indictment, and the jury was so advised.

Despite this, the Government on cross-examination continued to question appellant with respect to the stricken allegations; and in closing argument, the Government placed great stress on the fact that complainant testified that appellant had told her he represented the Holland Furnace Company and other companies, this having been denied by appellant. But these allegations had been stricken from the indictment.

The only function that this evidence served was one of prejudicing the jury. The Court in effect told the jury that if they believed the complainant's irrelevant testimony about representation it could disbelieve appellant's testimony relating to the one representation involved; to wit, the representation with respect to the chimney's need of repair.

It is submitted that this was error.

VI. THE ADMISSION OF EVIDENCE PERTAINING TO THE COST TO APPELLANT OF THE WORK TO BE DONE AND TO APPELLANT'S FAILURE TO SECURE PERMITS FROM THE DISTRICT OF COLUMBIA AND VIRGINIA WAS ERRONEOUS.

With respect to Point VI, appellant desires the Court to read the following pages of the reporters' transcripts: M-Tr. 28-32, 40-48.

The Government on cross-examination went to great lengths in trying to elicit the cost to appellant of doing the proposed work, the innuendo being that the complainant would have been grossly overcharged. This was strictly irrelevant and could only prejudice the jury against appellant. The overcharging by a person of his product is not a criminal offense and is not covered by the false pretense statute. Chaplin v. United States, 81 App. D. C. 80, 157 Fed. 2d 697, 699. It is submitted that the admission of this evidence constituted prejudicial error.

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In addition, the Court allowed the Government to bring out on cross-examination that appellant did not have a District of Columbia Home Improvement License nor a Virginia Permit. It is clear that failure of appellant to hold a District of Columbia Home Improvement License and a license from Virginia would have no bearing on appellant's credibility nor the substantive issues of this case.

Obviously, there was an attempt to prejudice the jury against appellant, and the admission of this irrelevant testimony could well have swayed the jury to find against appellant.

CONCLUSION

In view of the above, it is respectfully submitted that the Judgment of the District Court should be reversed.

Respectfully submitted,

Jerome J. Dick
Attorney for the Appellant
(Appointed by the Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,184

ROBERT L. MATHIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JOEL M. FINKELSTEIN,
Assistant United States Attorneys.

Cr. No. 723-64

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1) Whether the trial court properly denied appellant's motion for judgment of acquittal in a prosecution for false pretenses where the Government's evidence tended to prove that

(a) appellant represented to a homeowner that the chimney in her residence, which was connected to a gas furnace, had leaks from which there was a danger of explosion,

(b) appellant said, in view of this condition, the homeowner should have a chimney lining installed,

(c) relying on this representation, the homeowner executed and delivered to appellant two post-dated checks totaling $1171 for his promise to install a new chimney lining,

(d) and, through the testimony of an expert qualified to testify about the condition of furnaces and chimneys, the furnace and chimney in the homeowner's residence were not in need of repair, there was no danger of explosion, and there was no need for a new chimney lining.

2) Whether the trial court submitted the issue of value to the jury where the trial court instructed the jury "that the Government must prove beyond a reasonable doubt . . . that the execution and delivery of checks by the complainant in this case in the amount of $800 and $371 respectively, if the Government has proved such beyond a reasonable doubt, would constitute something of value in excess of $100."

3) Whether the assignment judge abused his discretion in denying appellant's motion for a continuance for the alleged purpose of discharging his appointed counsel and retaining counsel of his choice where appellant's motion was made the morning the trial was scheduled to com-

mence and there had been almost a three year delay since indictment due to appellant's flight from the jurisdiction and several continuances already granted appellant.

4) Whether in a prosecution for false pretenses, in which it is necessary to prove intent to defraud, the prosecutor's cross-examination of appellant, which elicited from him (1) facts bearing on the circumstances surrounding the alleged fraudulent transaction and appellant's qualifications for doing the work he said was needed and proposed to do and (2) an unsatisfactory explanation of the price he charged for such work, was proper.

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OTHER REFERENCES

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*Cases relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,184

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment filed August 10, 1964 with false pretenses in violation of 22 D.C. Code § 1301,[1] and on August 24, 1964, entered a plea of not

[1] The indictment alleged, in substance, that on or about March 2, 1964, appellant, with intent to defraud, falsely represented to Ruth M. Merwin that the furnace and chimney of the premises located at 2946 Newark Street, Northwest, were in need of repair; that appellant knew this representation was false and that Ruth M. Merwin, believing it to be true, and relying on it, delivered to appellant two checks in the amounts of $800 and $371.

guilty. On August 27, 1964, Sperry C. Oliver entered an appearance as counsel for appellant and on October 22, 1964, moved for a continuance on the grounds that he was unable to locate the main defense witness, one Robert E. Ramsey, that appellant was out of town on business and that he was behind in his work having fallen victim to the flu. On the following day the court granted the motion and instructed the assignment office to set a new trial date sometime in December, 1964.

On December 28, 1964, with trial set for the week of January 11, 1965, Oliver moved to withdraw as counsel on the ground that appellant had continuously failed to cooperate with him and had not communicated with him in a meaningful way. Oliver also represented that he received a letter indicating appellant's intention to discharge him. The court, however, denied Oliver's motion.

On January 14, 1965, appellant's case was called for trial but appellant failed to appear in court and forfeited bond in the amount of $2000.

More than a year later, on May 17, 1966, the United States Marshal for the District of Columbia, upon receiving information that appellant was in custody at the Shelby County Jail, Memphis, Tennessee, serving a sentence on local charges, notified the United States Marshal for the Western District of Tennessee that appellant was wanted here for failing to appear for trial and requested appellant's return to this jurisdiction. On October 19, 1966, after appellant was returned to this jurisdiction, the court vacated and set aside its order of forfeiture and remitted to the bonding company the sum of $2000 less any expense incurred by the United States in returning appellant to this jurisdiction.[2]

On February 6, 1967, due to his failure to appear in court, appellant's bond was again forfeited and a bench warrant issued which was returned unexecuted and with-

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[2] Because no expense was incurred by the Government in connection with appellant's subsequent appearance in District Court, the bonding company was remitted the full $2000.

drawn. On February 15, 1967, apparently because appellant appeared in court, the court vacated and set aside its order of forfeiture.

On April 6, 1967, appellant filed an affidavit of financial status. Relying on this affidavit, the court found that appellant was financially unable to obtain counsel and appointed Steven L. Engleberg to represent appellant.

On April 18, 1967, appellant moved for and obtained a two week continuance for the purpose of obtaining more time to prepare for trial. On May 10, 1967, the day appellant's trial began, appellant again moved for a continuance asserting that he expected to come into some money and wished to retain counsel.[3] Appellant's motion was denied by Judge Curran. He renewed this motion before Judge Waddy who relied on Judge Curran's ruling and denied it.[4]

Trial finally commenced on May 10, 1967 and upon a verdict of guilty terminated on May 15, 1967. On June 30, 1967, appellant was sentenced to a term of from one (1) to three (3) years. On the same day, appellant executed and filed an affidavit of poverty in support of his

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[3] See the notation on the District Court jacket.

[4] Appellant's counsel and Judge Waddy engaged in the following colloquy:

> MR. ENGLEBERG: Your Honor, yesterday, May 9th, the defendant called me and told me he expected to come into some money at the end of the week, and that he wished to have an attorney who had previously represented him represent him in this case, and would like to have a continuance.
>
> I went before Judge Curran this morning and he denied my motion.
>
> THE COURT: Was there any particular reason why the defendant wished to retain another attorney?
>
> MR. ENGLEBERG: The only reason that I know of was that the man, Joseph Donohue, had represented him previously, I believe in this matter, and as he had come into some money which he would get at the end of the week he would prefer to retain Mr. Donohue.
>
> THE COURT: Judge Curran went into this matter this morning, did he not?
>
> MR. ENGLEBERG: Yes, Your Honor.
>
> THE COURT: The motion is again denied.

request for leave to appeal without prepayment of costs. Among other things, he averred that he did not have a wife, parent or other person who may be able to assist him in paying the costs of his appeal. The District Court authorized appellant's appeal and by order of August 2, 1967, this Court appointed Jerome J. Dick to represent appellant.

On August 10, 1967, this Court remanded the record to the District Court for the purpose of vesting the District Court with jurisdiction to reduce appellant's sentence. On August 11, 1967, upon consideration of appellant's motion for a reduction of sentence, the District Court reduced appellant's sentence to a term of from six (6) months to twenty-four (24) months.

The Government's Case

The Government's first witness was Miss Ruth Merwin, the complainant. She testified that she resided at 2946 Newark Street, Northwest, a private home in which she possessed a half interest (B. Tr. 3-4).[5] Miss Merwin stated that in November, 1963, Ritchie's Heating Company[6] installed a Holland gas burner in her home (B. Tr. 4-5).

On March 2, 1964, at approximately 9:30 p.m., so Miss Merwin testified, appellant came to her home and informed her that he was furnace inspector representing the Holland Furnace Company (B. Tr. 6-7). He told Miss Merwin that furnaces were supposed to be inspected a few months after installation (B. Tr. 7). Miss Merwin testified that appellant, upon entering her home, went to the basement, made a number of tests on the furnace, and after examining the furnace, informed her that, because

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[5] The transcript was prepared by two court reporters, Patrine N. Brockmeyer and Martha J. Maloney. The numbering of the pages of transcript prepared by each reporter starts with page 1. "B. Tr." refers to the pages of transcript prepared by Miss Brockmeyer; "M. Tr." refers to pages of transcript prepared by Miss Maloney.

[6] The Metropolitan Heating Company has since taken over Ritchie's accounts (B. Tr. 5).

the chimney had leaks, the air passing through the furnace was inadequate and there was a danger of explosion (B. Tr. 8). Appellant, she stated, said that a lining should be installed in the chimney and suggested that Acme Heating Company do the job (B. Tr. 8). Miss Merwin asked appellant why Ritchie's could not do the job and appellant replied that Acme was a larger company and that Acme could install the lining the next morning (B. Tr. 9). Appellant then drafted and submitted a contract to Miss Merwin which read in part (B. Tr. 10-11, 42):

> I/we Ruth Mervin, Phone EM 3-2241, 2946 Newark Street, Northwest, purchased from Acme Heating, Incorporated, Arlington, Virginia, the following: Installed chimney liner of all metal construction, also a double wall, service controlled and rebuilt oil burner, all supposed to be guaranteed for ten years. Paid in full by check. Read before signing. Price of service, $1,221.00 less merchandise allowance, net $1,171, customer deposit $371, paid $800, paid on contract date.

Miss Merwin signed the contract and gave appellant two checks payable to the Acme Heating Company dated March 7, 1964, one payable in the amount of $800, the other payable in the amount of $371 (B. Tr. 12-13, 38).[7] Appellant informed Miss Merwin that the job would be started the next morning at 7:00 a.m. (B. Tr. 14).

At approximately 6:30 a.m. the next morning Miss Merwin telephoned Ritchie's Heating Company and as a result of her conversation with the personnel at Ritchie's she decided not to go forward with the installation of the chimney lining (B. Tr. 15). When the men from Acme arrived, she informed them of her change in plans, and they departed (B. Tr. 16-17). Later that day, she ordered the bank to stop payment on the checks she issued the night before to Acme and a few days later she reported the incident to the police (B. Tr. 15-17).

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[7] The checks were introduced in evidence and were endorsed by Acme Heating Company and appellant (B. Tr. 13).

On cross, Miss Merwin testified that the house in which she resided was approximately 50 years old, that prior to the installation of the Holland gas furnace in 1963, the house was heated by an oil furnace and that, at the time the gas furnace was installed, the chimney was not relined (B. Tr. 22). She stated that appellant, when he inspected the furnace, pointed to "a little black sooty place" at the base of the chimney which appeared to her to be "little pinpoint holes" (B. Tr. 24).

The Government then called Harry D. Wood, a plumbing inspector employed by the District of Columbia, and qualified him as an expert for the purpose of testifying on the condition of the furnace and chimney lining at Miss Merwin's residence (B. Tr. 45-46).[8] Wood said he inspected the furnace and chimney at Miss Merwin's residence on March 6, 1964 and stated in his opinion the furnace and chimney lining were not in need of any repairs (B. Tr. 48-49). Later, on redirect, Wood testified that he did not see any gas leaks in the chimney and in his opinion there was no danger of explosion (B. Tr. 60). He acknowledged that the chimney needed cleaning which he said was a minor job that would take about an hour (B. Tr. 49-50). Upon examining the contract executed by Miss Merwin, he stated that he found no need for the work itemized in the instrument (B. Tr. 50-51).

On cross, Wood testified that the chimney lining in Miss Merwin's home was terra cotta and that his inspection took about an hour (B. Tr. 52-53). Asked if it was likely a chimney lining made of terra cotta which had not been changed for a period of ten years would begin to show cracks, Wood answered, "this does happen, but I can't remember seeing anything in this particular case * * *" (B. Tr. 53). And asked if it would be a dangerous con-

[8] Wood testified that he was a licensed plumber with approximately 30 years of plumbing experience, that he had been a plumbing inspector for fifteen years (in answer to another question which he apparently misunderstood, Wood said he had been a plumbing inspector for four years) and that he had had occasion to inspect hundreds or thousands of furnaces (B. Tr. 45-46).

dition assuming there were cracks in the lining, he answered: "It would depend on the construction of the outer wall of the chimney" (B. Tr. 53). Continuing, he said he "found [the chimney] was good masonry and was a good chimney" (B. Tr. 54). He stated he could not recall if there were pinpoint holes at the base of the chimney but he said, if there were such holes, they would not indicate to him that the lining was cracked (B. Tr. 55).

Following Wood's testimony, the Government and appellant stipulated that the contract executed by Miss Merwin was written by appellant, and that the two checks issued by Miss Merwin were endorsed by appellant and on March 10, 1964 were deposited by him in an account under the name of Acme Heating Company, Robert L. Mathis, at the Citizens' Bank of Maryland (B. Tr. 60).

Appellant's Case

The Government then rested and, following appellant's argument on a motion for judgment of acquittal, the court and counsel, out of the hearing of the jury, discussed the use of appellant's prior convictions for impeachment purposes. At the conclusion of the discussion the court ruled that appellant's prior convictions—assault in 1959, false pretenses in 1960 and false pretenses twice in 1961—could not be used for impeachment purposes (B. Tr. 74-79).

With the benefit of this ruling, appellant testified on his own behalf. He stated that he was in the heating and air conditioning business under the name of Acme Heating and Cooling and that he employed three persons (M. Tr. 8). He estimated that approximately 40 percent of his work was devoted to the installation of chimney linings and that he had installed about 300 to 400 hundred such linings (M. Tr. 8).

He said he was told by his nephew, Roger Long, some time in February, 1964, that a Holland furnace had been installed in Miss Merwin's residence. He stated that he went to Miss Merwin's residence on March 2, 1964 to inspect the chimney. (M. Tr. 9-10.) According to appel-

lant, he told Miss Merwin that he knew a Holland furnace was installed in her residence by Ritchie's Heating Company and that he was "going to check that out for [her] and make sure that everything is working fine" (M. Tr. 11). He testified that he was told by one of the men who installed the furnace that her residence had a "chimney condition" (M. Tr. 11).[9] He denied that he informed Miss Merwin that he represented the Holland Furnace Company but said he mentioned in conversing with her that he spent five years with Holland Furnace (M. Tr. 11). He also denied that he told her that he represented Ritchie's Heating Company (M. Tr. 12). He said he told Miss Merwin he was from Acme Heating Company (M. Tr. 33).

Appellant said he checked the furnace and found it to be "in good shape" but, referring to the chimney, stated he noticed small cracks in the brick and masonry (M. Tr. 12). As appellant put it: "The mortar between the bricks, you could practically put your fingers through" (M. Tr. 12, 39). He claims it was this observation which prompted him to recommend the work described in the contract (M. Tr. 12). He explained his recommendation as follows (M. Tr. 13):

> Well, I just explained the fact that the holes were there, then, of course, naturally there is gas—I believe it is 130 gallons furnace there and, naturally, there was a lot of gas escaping from it and naturally, with the openings in the chimney and it stands to reason when there are openings in the furnace, it can come out in the living quarters, and that is a fact.

Appellant denied that he told Miss Merwin that the chimney or house would explode but said (M. Tr. 13):

> * * * well, I did, I mentioned the fact of carbon monoxide gas poison but I never told her it was that

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[9] Later, on cross, appellant testified that he learned from Roger Long, his nephew, who was employed by Ritchie's, that Ritchie's installed a Holland gas furnace in Miss Merwin's residence, and he stated that he was told by Long that the chimney at Miss Merwin's residence needed a lining (M. Tr. 24).

> bad, that she would get that much, but I told her, I says, "I can't tell you how or when these things can happen but all I can say is this, the holes are there and it can leak." And it is as simple as that, but when or how or why, I don't know.

Asked if the holes indicated anything about the condition of the lining, appellant answered (M. Tr. 14):

> Well, in other words, the soot was on the inside of the chimney and if it came out through the openings it stands to reason that the lining had to be broken in some part or there was no lining at all in it. As the soot got out, I based my decision on that.

Appellant testified that he knew the furnace he examined was a gas furnace and that he made a mistake in the contract by calling it an oil furnace (M. Tr. 15, 36-37).

On cross, appellant acknowledged he was not employed by Ritchie's Heating Company when he went to Miss Merwin's residence but said he did work for Ritchie's for approximately two weeks in 1962 (M. Tr. 21). He stated that he knew Ritchie's installed and serviced Holland furnaces (M. Tr. 23-24). And later, he admitted that he did not have a home improvement license in the District of Columbia on the day he went to Miss Merwin's house but said he did not know he needed such a license to install chimney linings (M. Tr. 31-32).

Appellant explained that the notation on the contract indicating that he would "rebuild" the furnace meant only that he would "check" it after installing the new chimney lining (M. Tr. 38-39).

Later on cross, he admitted he did not even see the chimney lining when he inspected the furnace (M. Tr. 40). In an effort to explain his price of $1171, he said (M. Tr. 41):

> The offset, if this were done, a straight chimney I could have lined it anywhere from three hundred to three hundred and fifty dollars, but not being a straight chimney and with the offsets that are in there, I would have to cut in through the interior wall

> —excuse me, go in through the fireplace and after doing all this, install the offsets and I would have to hire a subcontractor, which I don't do that work, bring a brick mason in and brick all this in and that would cost me much more than the lining itself.

Asked how much the lining would cost him, he answered, "I would say in the neighborhood of a hundred and fifty—about a hundred and seventy-five dollars" (M. Tr. 42-43). Itemizing his bill, he said he was charging Miss Merwin $380 for the liner and about $150 or $175 for labor (M. Tr. 45-46). Accounting for his labor cost, he said he estimated that three men could complete the job in about two or two and a half days (M. Tr. 47). He could not satisfactorily explain his reason for charging Miss Merwin a total of $1171 (M. Tr. 47-48). He then described how Miss Merwin paid him (M. Tr. 48):

> I insisted on a three hundred and seventy-one dollar deposit. * * *. There was no money in the bank for the eight hundred dollar check, but she asked me about taking the eight hundred dollars check and she was going to postdate it for the following day and she did, apparently. I assume she did. She gave me this check knowing that the money was not in the bank and she was to transfer these funds the following day from her savings account into the checking account. That was Miss Merwin's suggestion.

Appellant admitted that, after he found out Miss Merwin did not want the work done, he deposited the two checks into his account anyway. He explained that it was his belief that Miss Merwin was bound by the contract. (M. Tr. 49.) He stated that, after depositing Miss Merwin's checks in his account, he drew a certified check in the amount of $1100 on his account which he cashed (M. Tr. 50-52). He said he found out three days after depositing the checks that Miss Merwin had stopped payment on them (M. Tr. 50-51).

After appellant testified, he called Arthur Bolenbaugh, a building consultant employed by the Metal Distributing

Company of Alexandria, Virgina (M. Tr. 55-56). Mr. Bolenbaugh testified that he was in the business of selling chimney linings and gave other credentials qualifying himself as an expert on chimney linings (M. Tr. 56-58).

He testified that he had not visited or inspected Miss Merwin's premises (M. Tr. 66). Given a hypothetical house in the District of Columbia, fifty years old, with a masonry chimney lined with terra cotta which has not been changed in ten years—the chimney being attached to a gas heating unit which replaced an oil burner at the end of the ten year period—he said in his opinion there was a need for a chimney lining (M. Tr. 63-64). On cross, Mr. Bolenbaugh clarified his statement testifying that he did not mean that a new lining should replace the old but that a lining of some kind should be in the chimney (M. Tr. 67-68). On redirect, appellant's counsel asked the following question (M. Tr. 72):

> Mr. Bolenbaugh, given the fact, assuming the fact that you have a chimney with a terracotta lining at least ten years old—a terracotta lining—and given a switch from a gas to an oil burner at the end of this ten year period, would you recommend that there should be a new liner in that chimney?

Mr. Bolenbaugh answered:

> Without seeing the job I wouldn't recommend a new liner; I would recommend an inspection.

And later appellant's counsel asked (M. Tr. 73):

> Is there anything that occurs in . . . a [terra cotta] liner with the passage of time?

Mr. Bolenbaugh answered:

> To such a liner, nothing in fifty years will do anything to that terracotta lining that I know of.

But Mr. Bolenbaugh did testify that if the mortar joints of the chimney were in a state of deterioration, he would recommend a new lining for safety reasons (M. Tr. 74).

Appellant's final witness was Roger Long, appellant's nephew, who testified that in November, 1963, he worked

for Ritchie's Heating Company and helped install a Holland gas furnace in Miss Merwin's home (M. Tr. 75-77). He said, when installing the furnace, he noticed mortar fragments at the bottom of the chimney and small chips of terra cotta lining which had fallen (M. Tr. 77). He said, because Ritchie's did not do chimney work, he called appellant and advised him that the chimney in Miss Merwin's residence might need some work (M. Tr. 78). On cross, he testified that he informed appellant that Miss Merwin's residence had an oil furnace but he later said he thought he did not specify what kind of furnace Miss Merwin had (M. Tr. 85-86).

Following the presentation of evidence, counsel made closing argument and the court charged the jury. After three days of trial and two hours of deliberation, the jury found appellant guilty of false pretenses.

This appeal followed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Title 22, District of Columbia Code, Section 102 provides:

> The words "anything of value," wherever they occur in this title, shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value.

Title 22, District of Columbia Code, Section 1301 provides in pertinent part:

> Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instru-

ment of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both.

SUMMARY OF ARGUMENT

I. Appellant contends that the trial court erred in refusing to grant his motion for judgment of acquittal. He argues, first, that the evidence demonstrated only that there were differences of opinion on the question of the need for a new chimney lining in Miss Merwin's residence.

While it is true that ordinarily an expression of opinion will not render a person liable for false pretenses, if one renders an opinion he knows to be erroneous the matter as to him is not opinion but a fact. And so here, if appellant represented to Miss Merwin that the chimney to her residence was in need of a new lining, knowing his representation to be untrue, he may be held accountable for false pretenses. Whether a representation is an expression of opinion or an affirmation of fact is a question for the jury. The evidence, we submit, was more than ample to support submitting this issue to the jury.

Appellant contends, second, that because the two checks he received from Miss Merwin on March 2, 1964 were post-dated, March 7, 1964, and because Miss Merwin

stopped payment on them on March 3, 1964, he received two checks, which, although payable in the amounts of $800 and $371, respectively, were worthless. But a post-dated check is a negotiable instrument which, if it reaches the hands of a holder in due course, may form the basis for an action against the maker for its face value. Thus, what the maker loses as a result of the fraud which induces him or her to execute and deliver a negotiable instrument is the possibility of an action and a resulting judgment for the face value of the instrument. Because the offense is complete when the instrument is executed and delivered, the instrument's value is measured by the loss the maker could have suffered when the instrument was executed and delivered, not the loss the maker actually suffered. And so here, when appellant obtained Miss Merwin's promise to pay $1171 in the form of two post-dated checks, he obtained something of value to the tune of $1171.

II. Appellant contends that the trial court "instructed the jury that if it found the two checks had been issued and delivered to appellant then it had to find that the checks were worth $100.00 or more." Appellant's Brief at 16. We think appellant has misread the court's instruction. The court did not take the issue of value away from the jury but, rather, instructed the jury as follows: "you are instructed that the Government must prove beyond a reasonable doubt . . . that the execution and delivery of checks by the complainant in this case in the amount of $800 and $371 respectively, if the Government has proved such beyond a reasonable doubt, would constitute something of value in excess of $100." (M. Tr. 145).

In any event, appellant stipulated that he endorsed and negotiated the checks by depositing them into his account, and he testified that he subsequently drew a certified check on his account for $1100 which he cashed (B. Tr. 60, M. Tr. 50-52). In view of this, we do not think appellant can argue here that the issue regarding the value of the checks was taken from the jury.

III. Appellant argues that the failure of the court to grant a continuance on the morning trial was scheduled to commence, upon his representation that he expected to come into some money within a week and wished to discharge his court-appointed counsel and retain counsel of his own choice, denied him effective assistance of counsel within the meaning of the Sixth Amendment. While the Sixth Amendment's right to counsel includes the right to retain counsel of one's own choice, it does not secure to the accused a license to exercise this right for the purpose of obstructing orderly procedure in the courts or interfering with the fair administration of justice. Where the accused has had an opportunity to retain counsel of his choice, the decision whether to grant a continuance on the eve of trial for the purpose of allowing an accused to discharge his present counsel and to retain another counsel is within the discretion of the trial court and where, as here, there has been an adequate opportunity to retain counsel and almost a three year delay between indictment and trial occasioned by appellant's conduct—his flight from the jurisdiction and the granting of a number of previous continuances for a variety of reasons—the trial court's ruling denying appellant another continuance was well within the permissible bounds of its allotted discretion.

IV. Appellant complains about the prosecutor's cross-examination which elicited from him (1) the fact that, when he inspected the furnace and chimney in Miss Merwin's residence, he was not working for the Holland Gas Furnace Company and Ritchie's Heating Company, (2) an unsatisfactory explanation for his charging Miss Merwin $1171 for the work itemized in the contract, and (3) the fact that he did not have a District of Columbia Home Improvement License. But this cross-examination was perfectly proper for it was designed to elicit, and did elicit, evidence which was relevant to the issue of appellant's intent to defraud.

ARGUMENT

I. The trial court properly denied appellant's motion for judgment of acquittal.

(B. Tr. 8, 12-13, 38, 48-49, 60; M. Tr. 49-52, 72, 73)

Appellant contends that the trial court erred in refusing to grant his motion for judgment of acquittal. If the evidence was such that reasonable men might or might not find guilt beyond a reasonable doubt, the trial court's ruling on appellant's motion for judgment of acquittal must be upheld. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Crawford* v. *United States*, —— U.S. App D.C. ——, 375 F.2d 332 (1967). And in evaluating the evidence in light of this standard, the trial court and this Court on appeal "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. at 392, 160 F.2d at 332.

"The crime of false pretense has five elements: false representation, knowledge of falsity, intent to defraud, reliance by the defrauded party, and obtaining something of value." *Ciullo* v. *United States*, 117 U.S. App. D.C. 31, 32, 325 F.2d 227, 228 (1963). The thrust of appellant's argument centers on the first and last elements. First, he contends that the evidence at best demonstrated that there were differences of opinion on the question of the need for a new chimney lining in Miss Merwin's residence —that appellant voiced his opinion that the chimney needed a new lining which, so he argues, was not a misrepresentation of an existing or past fact.[10] Second, he contends that the Government failed to prove that the value of the checks he received from Miss Merwin was $100 or more.[11] We think appellant's argument is without merit.

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[10] Appellant's Brief at 24.

[11] Appellant's Brief at 13-16.

A. *False representation*

A false representation, if it is to support a conviction for false pretenses, must relate to a past or existing fact. See *United States* v. *Engle*, 48 App. D.C. 466 (1919). It is not enough if the representation is merely an expression of opinion or belief. See PERKINS, CRIMINAL LAW, 254 (1957). But the line between a false representation of an existing fact and an expression of opinion is not always clear. As the court said in *State* v. *Grady*, 147 Miss. 446, 111 So. 148, 149 (1927):

> The mere expression of an opinion which is understood to be only an opinion does not ordinarily render the person expressing it liable to a prosecution for obtaining property by false pretenses. [Citation]. Frequently it is difficult to draw the line between an expression of opinion and a representation of fact, but, if one knows an opinion to be erroneous, the matter is as to him not an opinion but a subsisting fact, and, if he makes a statement contrary to what he knows to be the fact, it would seem that he should not be allowed to escape the consequences on the theory that his statement concerns a matter of opinion. * * * If [an expression of opinion] is given in bad faith, with knowledge of its untruthfulness, to defraud others, the person making it is liable, especially when it is as to a fact affecting quality or value and is peculiarly within the knowledge of the person making it.

See *People* v. *Gordon*, 71 C.A.2d 606, 163 P.2d 110, 123-24 (Dist. Ct. App. 1945); *State* v. *Stone*, 95 S.C. 390, 79 S.E. 108 (1913); *Commonwealth* v. *Watson*, 146 Ky. 83, 142 S.W. 200 (1912); *Williams* v. *State*, 77 Ohio St. 468, 83 N.E. 802 (1908); *Watson* v. *New York*, 87 N.Y. 561 (1882).

Whether a representation is an expression of opinion or an affirmation of fact is a question for the jury. *State* v. *Grady*, *supra*; *People* v. *Gordon*, *supra*. Thus, if appellant represented to Miss Merwin that the chimney to her residence was in need of a new lining, knowing his repre-

sentation to be untrue, he would have satisfied the first element of the offense—making a false representation. See *Herrick* v. *State*, 159 Me. 499, 196 A.2d 101 (1963).[12] We think the evidence in this case was ample to support submitting this issue to the jury. The evidence, in brief, was as follows.

Miss Merwin testified that appellant inspected her furnace and informed her that, because the chimney had leaks, the air passing through the furnace was inadequate and there was a danger of explosion. She further testified that appellant, having given her an appraisal of the condition of her chimney, said a lining should be put in the chimney to prevent the escape of air. (B. Tr. 8.) On the basis of the representation, Miss Mervin entered into a contract with appellant calling for the installation of a new chimney lining, and gave appellant two checks totaling $1171 (B. Tr. 12-13, 38).

Harry Wood, a plumbing inspector for the District of Columbia, testified that he inspected the furnace and chimney in Miss Merwin's residence less than a week after appellant induced Miss Merwin to contract for the installation of a new chimney lining. He stated in his opinion the furnace and chimney lining were not in need of any

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[12] The facts in *Herrick* v. *State*, *supra*, are strikingly similar to those presented here. In *Herrick*, the defendant, who challenged his indictment, was convicted on a plea of guilty for having misrepresented to a homeowner that certain repairs were necessary to the roof and chimney of her residence. He stated that he would perform the labor and would furnish the materials in return for $650, a price which the homeowner paid. Disposing of the contention that the defendant's statement that certain repairs were necessary was merely an expression of opinion, the court quoted from 35 C.J.S. False Pretenses, § 11 and wrote (159 Me. at , 196 A.2d at 105):

> Where one represents as true a thing which he knows not to be true, such a representation falls within the statute, even though in some situations the truth or untruth of the statement might be a matter of opinion.

And later, the court said:

> Whether the statement were [sic] an expression of opinion, by its nature or under the circumstances peculiar to this case rather than its specific phrasing, is a jury question.

repairs. (B. Tr. 48-49.) He further testified that he found no need for the work itemized in the contract signed by Miss Merwin (B. Tr. 50-51). And he stated that he did not see any gas leaks in the chimney, and said in his opinion there was no danger of explosion (B. Tr. 60). This evidence, we submit, was more than sufficient to withstand appellant's motion for a judgment of acquittal.

Relying primarily on defense testimony, appellant argues that the court erred in denying his motion for judgment of acquittal presumably made at the close of his case. To be sure, appellant's testimony was not consistent with Miss Merwin's testimony in many respects, and he sought to explain his reason for recommending a new chimney lining. But the most that can be said for his testimony, or for that matter the testimony of witnesses who testified on his behalf, was that it raised questions of fact which were appropriately submitted to the jury, and determined against him. Indeed, some of appellant's testimony, in our view, supported the Government's case. For example, appellant's own expert, Mr. Bolenbaugh, testified he would not recommend a new lining but simply an inspection if all he knew was that the chimney had a ten-year-old terra cotta lining and there was a switch from an oil to a gas furnace at the end of the ten year period (M. Tr. 72). Mr. Bolenbaugh further testified that "nothing in fifty years will do anything to [a] terra cotta lining . . ." (M. Tr. 73). In short, without reviewing all the details established by the evidence as set forth in the counterstatement, we think appellant's argument that the court erred in denying his motion for judgment of acquittal is totally without merit.

B. *Value of Miss Merwin's checks*

Appellant contends that because the two checks he received from Miss Merwin on March 2, 1964 were postdated, March 7, 1964, and because Miss Merwin stopped payment on them on March 3, 1964, he received two checks, which, although payable in the amounts of $800

and $371, respectively, were worthless.[13] Appellant's Brief at 13-16.

To be sure, if a sentence of not less than one year nor more than three years is imposed, 22 D.C. Code § 1301 requires as an element of the offense of false pretenses that the property obtained as a result of the false representation be "anything of value" of $100 or more. Of course, a check may be the subject of fraud under 22 D.C. Code § 1301.[14] See *Partridge* v. *United States*, 39 App. D.C. 571, 580 (1913) (promissory note); *Bargie* v. *United States*, 2 Hayw. & H. 357, Fed. Cas. No. 18,229 (1861) (endorsement on a bank draft). In fact, section 1301, after condemning obtaining "anything of value" by false pretenses, proscribes in more specific language procuring by false pretenses "the execution and delivery of any instrument of writing . . . , or the signature of any person, as maker . . . upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness. . . ." Appellant does not contend that a check may not be the subject of fraud under 22 D.C. Code § 1301. He argues only that a post-dated check on which the maker stops payment before the date of maturity has no value for purposes of 22 D.C. Code § 1301. We think it does.

A post-dated check is a negotiable instrument similar to a bill of exchange payable at a future date. See *Daine* v. *Price*, 63 A.2d 767, 768 (Mun. Ct. App. D.C. 1949); 28 D.C. Code §§ 103, 113, 1001, 1002 (1961).[15] Like any

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[13] To buttress his argument, appellant claims that the record reflects that Miss Merwin had insufficient funds in her bank account to cover these checks. Appellant's Brief at 15. But the record reflects only that appellant testified that Miss Merwin informed him there were insufficient funds in her checking account to cover the $800 check and that she would transfer funds from her savings account to her checking account the following day (M. Tr. 43).

[14] As used in Title 22, the phrase "anything of value" includes "bank notes and other forms of paper money, and commercial paper and other writings which represent value." 22 D.C. Code § 102.

[15] The Uniform Commercial Code replaced the Negotiable Instrument Act in the District of Columbia as of January 1, 1965. The

other negotiable instrument, it is a thing of value and may be the subject of fraud in a prosecution for false pretenses. *Barefield* v. *State*, 169 Tex. Crim. 76, 331 S.W.2d 754 (1960). This is so because, if it reaches the hands of a holder in due course, it may form the basis for an action against the maker for its face value. The fact that the maker was induced by fraud to execute the instrument would not be a defense in such an action. 28 D.C. Code §§ 407, 408 (1961); *Blow* v. *Ammerman*, 121 U.S. App. D.C. 351, 350 F.2d 729 (1965). Thus, what the maker loses as a result of the fraud which induces him or her, as the case may be, to execute and deliver a negotiable instrument is the possibility of an action and a resulting judgment for the face value of the instrument. It makes no difference that the maker suffered no actual pecuniary loss or that the accused failed to realize the proceeds of the check. *Bargie* v. *United States*, *supra*; *Clagett* v. *United States*, 53 App. D.C. 134, 289 Fed. 532 (1923); *Gilmore* v. *United States*, 106 U.S. App. D.C. 344, 273 F.2d 79 (1959); *Reeves* v. *State*, 68 Okla. Crim. 163, 96 P.2d 536 (1939) (uncashed check); *Holton* v. *State*, 109 Ga. 127, 34 S.E. 358 (1899) (promissory note from an insolvent maker). Because the gist of the crime is obtaining a thing of value by a false representation, the offense is complete when the check is obtained. *Bargie* v. *United States*, *supra*; *Reeves* v. *State*, *supra*; *Carroll* v. *State*, 347 P.2d 812, 818 (Ct. Crim. App. Okla. 1959); *Miller* v. *People*, 72 Colo. 375, 211 Pac. 380 (1922); *Updike* v. *People*, 92 Colo. 125, 18 P.2d 472, 475 (1933). The fact that subsequent to the fraudulent transaction the maker takes action to protect himself or herself and is, indeed, reimbursed does not accrue to the benefit of the accused. *Gilmore* v. *United States*, *supra*. Because the offense is complete when the check is obtained, the check's value in a prosecution for false pretenses is measured by the loss

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transaction for which appellant was prosecuted occurred in March 1964 and hence was covered by the Negotiable Instrument Act, 28 D.C. Code § 101 *et seq.* (1961). *Cf. Blow* v. *Ammerman*, 121 U.S. App. D.C. 351, 350 F.2d 729 (1965).

the maker could have suffered when the instrument was executed and delivered, not the loss the maker actually suffered. In holding a signature obtained as a surety on a promissory note a thing of value, Justice Van Syckel said nearly a century ago writing for the Supreme Court of New Jersey in *State* v. *Thatcher*, 35 N.J.L. 445, 453 (1872):

> Is the maker's own note or contract of suretyship a valuable thing? The signing of the name was an act—the name, when signed, was a thing. Was it a thing of value? While it remained locked up in his secretary, it was of no value to the maker, but *ev instanti* it passed out of his hands by the fraud, it became impressed with the qualities of commercial paper, and possessed to him the value which it might cost to redeem it from a *bona fide* holder. The moment Case delivered these signatures, he assumed a liability to pay $1,000, contingent upon their being negotiated. Can it, therefore, be said that a paper which imposed such a risk, was of no value to the maker? Its value to him consisted not in what it put in his pocket, if he retained it, but in what might be taken out of his purse by the delivery of it to the defendant.[16]

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[16] Under a predecessor statute to 22 DC. Code § 1301, An Act for the Punishment of Crimes in the District of Columbia, § 12, March 2, 1831, 4 Stat. 449, the Court held that the offense of false pretenses was complete when a fraudulent endorsement was obtained on a negotiable instrument and that it was not necessary to sustain a conviction for false pretenses to prove that the complainant actually suffered pecuniary loss owing to his endorsement. *Bargie* v. *United States*, 2 Hayw. & H. 357, Fed. Cas. No. 18,229 (1861). The Court said (2 Hayw. & H. at 362):

> The draft and signature so set out for inspection of the Court, and the signature so averred to be obtained and procured by the prisoner from Chambers on the back of the negotiable draft, is in law an endorsement. It is a contract in writing by the endorser Chambers, for the payment to the holder of the $120 named in the draft.
>
> * * * *
>
> That the contract of the endorser is conditional and not absolute, does not, in our judgment, vary the offense charged

And it may well be inconsequential that the maker was insolvent when the instrument was executed—although we need not go so far for our purposes here. As the court noted in *Holton* v. *State*, 109 Ga. 127, 34 S.E. 358, 361 (1899):

> It will not do to say that a written promise to pay money is valueless because the maker is not at the time possessed of property. It is his obligation. Upon it a judgment may be rendered carrying with it a lien on all future-acquired property.

See also *McCormick* v. *State*, 161 So.2d 696 (Ct. App. Fla. 1964), *cert. discharged, petition dismissed*, 170 So.2d 589 (Sup. Ct. Fla. 1964).

And so here, when appellant obtained Miss Merwin's promise to pay $1171 in the form of two post-dated checks, he obtained something of value to the tune of $1171. The fact that Miss Merwin stopped payment on the checks before their maturity date did not destroy their value. Indeed, appellant himself was able to realize the proceeds of the checks by endorsing them and depositing them into his account and drawing a certified check on his account in the amount of $1100 which he subsequently cashed.[17] (M. Tr. 49-52). It seems to us that the facts of this case

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against the prisoner. It is a valuable security, proper to be, and we think meant to be protected by the Legislature.

* * * *

[I]t is immaterial whether Chambers paid the money on the draft and endorsement or not. The offense of the prisoner was complete when he fraudulently obtained the endorsement of Chambers. By that endorsement Chambers contracted an obligation in writing, conditional in its terms, to pay the money named in the draft to the *bona fide* holder of it.

[17] We note that 22 D.C. Code § 1301 defines as a separate offense the fraudulent disposition of a negotiable instrument for value, knowing the instrument to be worthless or knowing the signature of the maker to have been obtained by false pretenses. Compare 18 U.S.C. § 1025. We think it wholly illogical to read one provision, which defines two separate offenses, as requiring proof of one offense as an element of the other. We believe this would be required if appellant's position is accepted.

pointedly illustrate the fallacy of appellant's position. On the one hand, he argues that he received two worthless checks from the victim of his fraud, while, on the other, he testifies that he realized $1100 in cash from the checks he characterizes as worthless. We think appellant's argument has no basis in logic and accordingly submit it has no basis in law.

II. The trial court properly instructed the jury on the issue of value.

(M. Tr. 50-52, 98-99, 142, 145; B. Tr. 60)

Appellant complains about the following portion of the court's instruction which was given over his objection (M. Tr. 98-99, 145):

> The fifth element that must be proved beyond a reasonable doubt is that because of his reliance, the defendant obtained from him something of value and, sixty [sixth?], the value of the property so obtained was $100 or more.
>
> In connection with the fifth and sixth elements that I have just mentioned, you are instructed that the Government must prove beyond a reasonable doubt these elements and that the execution and delivery of checks by the complainant in this case in the amount of $800 and $371 respectively, if the Government has proved such beyond a reasonable doubt, would constitute something of value in excess of $100.

Appellant contends that the trial court "instructed the jury that if it found the two checks had been issued and delivered to appellant then it had to find that the checks were worth $100.00 or more." Appellant's Brief at 16. In short, appellant reads the court's instructions as having taken the issue of value away from the jury. We think appellant has misread the court's instruction. Appellant reads the last phrase of the instruction, as set out above, as the object of the verb "are instructed." He reads the court's instruction as if it said: "you are instructed . . . that the execution and delivery of checks by the complain-

ant in this case in the amount of $800 and $371 respectively, if the Government has proved such beyond a reasonable doubt, would constitute something of value in excess of $100." The last phrase of the instruction, as set out above, is not, however, the object of the verb "are instructed" but rather is the object of the verbal phrase "must prove beyond a reasonable doubt." The instruction should be read as follows: "you are instructed that the Government must prove beyond a reasonable doubt . . . that the execution and delivery of checks by the complainant in this case in the amount of $800 and $371 respectively, if the Government has proved such beyond a reasonable doubt, would constitute something of value in excess of $100."

This reading of the instruction is the only reading which is consistent with the preceding paragraph of the court's charge and the introductory phase of the paragraph in question. For in the preceding paragraph the court instructed the jury that the fifth and sixth elements of the offense must be proved beyond a reasonable doubt and, in so doing, the court defined the sixth element as "the value of the property so obtained was $100 or more." In the introductory phrase to the paragraph in question—"In connection with the fifth and sixth elements that I have mentioned" —the court made it clear that it was only expanding on what it had previously said.

Furthermore, before defining the offense the court carefully instructed (M. Tr. 142):

> In order that you might understand what the Government must prove beyond a reasonable doubt in order to find this defendant guilty, you are given the following instruction:
>
> The essential elements of the offense of false pretenses, each of which the Government must prove beyond a reasonable doubt, are:
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> * * * *

In short, the court's instruction on the issue of value, when put in its proper prospective, clearly imposes on the

jury the duty to find beyond a reasonable doubt that the checks executed and delivered by Miss Merwin to appellant had a value of $100 or more.

In any event, we do not think under the circumstances of this case appellant could have been prejudiced even if the jury misunderstood the instruction. While there was a legal question as to the worth of Miss Merwin's checks —that is whether a post-dated check on which the maker stops payment before the due date has any value—the evidence below disclosed that appellant endorsed and negotiated the checks by depositing them into his account. There was no dispute as to this fact for appellant stipulated so much (B. Tr. 60). Furthermore, appellant admitted that, after he deposited the checks, he drew a certified check on his account for $1100 which he cashed (M. Tr. 50-52). In view of this, we do not think appellant can argue here that the issue regarding the value of the checks was taken from the jury. See *Norris* v. *State*, 170 Ark. 484, 280 S.W. 398, 402 (1926); *cf. Chew* v. *United States*, 112 U.S. App. D.C. 6, 298 F.2d 334 (1962).

III. In view of the number and length of the delays occasioned by appellant, the assignment judge did not abuse his discretion in denying appellant's motion for a continuance for the alleged purpose of discharging his appointed counsel and retaining counsel of his own choosing where appellant's motion was made the day trial was scheduled to begin.

On the morning trial commenced appellant moved for a continuance for the purpose of dismissing his court-appointed counsel and retaining counsel of his own choosing. He represented to the court that he expected to receive funds within a week with which he could retain his own counsel.[18] Judge Curran, who was sitting as assignment judge, denied appellant's motion and Judge Waddy before

[18] Appellant states in his brief that he received a telegram from his sister the day before trial advising him that she would send him funds to secure counsel. The record, however, does not disclose if the telegram—if there was such a telegram—was brought to the attention of the court.

whom appellant was tried relied on Judge Curran's ruling and did likewise. Appellant argues that the court's ruling denied him effective assistance of counsel within the meaning of the Sixth Amendment.

While the Sixth Amendment's right to counsel includes the right to retain counsel of one's own choosing,[19] it does not secure to the accused a license to exercise this right for the purpose of obstructing orderly procedure in the courts or interfering with the fair administration of justice. *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied sub. nom., Ormento* v. *United States*, 375 U.S. 940 (1963);[20] see also *United States* v. *Llanes*, 374 F.2d 712, 717 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967) ("Judges must be vigilant that requests for appointment of a new attorney on the eve of trial should not become a vehicle for achieving delay."); *United States* v. *Barney*, 371 F.2d 166, 168-170 (7th Cir. 1966), *cert. denied*, 387 U.S. 945 (1967); *United States* v. *Cozzi*, 354 F.2d 637, 639 (7th Cir. 1965), *cert. denied*, 383 U.S. 911 (1966);[21] *United States* v. *Abbamonte*, 348 F.2d 700, 703 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966). Thus, in *Cleveland* v. *United States*, 116 U.S. App. D.C. 188, 322 F.2d 401, *cert. denied*, 375 U.S. 884 (1963), this Court

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[19] *Lee* v. *United States*, 98 U.S. App. D.C. 272, 235 F.2d 219 (1956).

[20] In *United States* v. *Bentvena, supra*, the Court of Appeals for the Second Circuit stated the rule as follows:

> An accused's right to select his own counsel . . . cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.

[21] In *United States* v. *Cozzi, supra*, the Court of Appeals for the Seventh Circuit said:

> [An accused's Sixth Amendment right to select his own counsel] is a right to be exercised at an appropriate stage within the procedural framework of the system of criminal jurisprudence of which it is apart. Absent justifiable basis therefor there is no constitutional right to make a new choice of counsel, with attendant necessity for a continuance because thereof, at the time the trial is scheduled to commence.

upheld an assignment judge's refusal to grant a continuance on facts strikingly similar to those presented here. In *Cleveland*, the trial court, upon defendant's motion to proceed *in forma pauperis*, appointed counsel on defendant's behalf. After a series of delays precipitated by various motions filed by the defendant, the defendant informed the court that he preferred to be represented by a legal intern rather than counsel originally appointed. The court thereupon allowed a legal intern to enter an appearance on behalf of the defendant and permitted appointed counsel to withdraw. This of course caused further delay. On the day trial was to commence, a member of the bar informed the assignment judge that he was prepared to enter an appearance as retained counsel on behalf of the defendant if the court would grant a two-day continuance. This the court refused to do, and the defendant went to trial represented by a legal intern. At trial, the legal intern informed the trial judge that the defendant had refused to cooperate with him and that due to this lack of cooperation he felt he could not "give the defendant the most effective assistance of counsel possible." The trial judge thought he was bound by the assignment judge's ruling and refused to grant a continuance. This Court, in upholding the assignment judge's refusal to grant a continuance, wrote (116 U.S. App. D.C. at 189, 322 F.2d at 402):

> Of course the right to counsel is one of the important basic rights, and the right to choose one's own counsel is a vital element in that basic right. Troublesome questions can arise in this field. In the case before us counsel for Cleveland earnestly presses upon us the view that the upshot of the assignment judge's refusal to continue the trial for two days was that the defendant was required to face a serious criminal charge represented by a lawyer "he didn't want" and a lawyer who himself felt that he could not "give the defendant the most effective * * * assistance of counsel possible." Counsel urges that when

> the constitutional right is pitted against the inconvenience of delay a substantial presumption must be indulged in favor of the former. This is true, but in the case at bar Cleveland is not asserting a bare right to counsel or to choose his own counsel. He is asserting a *third* choice. He had first chosen to have the court appoint counsel for him; this was done. He then chose to have a lawyer from the Intern program; this was granted. Then on the day of the trial he advanced a third choice, i.e., retained counsel. The problem here is not the right to counsel of the defendant's choice. It is whether another continuance was required to allow the defendant to exercise the right to a third choice. We think that, under the circumstances of this case, the assignment judge could reasonably have concluded that it was not. [Emphasis in the original].

See also *McGill* v. *United States*, 121 U.S. App. D.C. 179, 348 F.2d 791 (1965).

The facts here, we think, are even more compelling than those in *Cleveland*. Appellant was charged by indictment filed August 10, 1964. A little more than two weeks later, Sperry C. Oliver entered an appearance as counsel on behalf of appellant. On October 22, 1964, appellant, through counsel, moved for a continuance. On the following day the court granted a continuance and a new trial date was set. With trial scheduled for the week of January 11, 1965, appellant's counsel moved to withdraw on the ground that appellant had continuously refused to cooperate with him and had not communicated with him in a meaningful way. The court denied this motion.

On January 14, 1965 appellant's case was called for trial but appellant failed to appear. It was more than a year later before appellant was located. Having received information that appellant was in custody at the Shelby County Jail, Memphis, Tennessee, serving a sentence on local charges, the United States Marshal for the District of Columbia notified the Marshal for the Western District of Tennessee and requested appellant's return to this jurisdiction.

Appellant was thereafter returned to this jurisdiction. On February 6, 1967, appellant again failed to appear in court. The court ordered his bond forfeited and issued a bench warrant which was returned unexecuted and withdrawn. On February 15, 1967, the court vacated and set aside its order of forfeiture apparently because appellant appeared in court.

On April 6, 1967, appellant filed an affidavit of financial status. Relying on this affidavit, the court found that appellant was unable to obtain counsel and appointed Steven L. Engleberg who represented appellant below. On April 18, 1967, appellant's counsel moved for and obtained a two week continuance for the purpose of obtaining more time to prepare for trial. On May 10, 1967, the day appellant's trial was to begin—almost three years after indictment, several months after appellant's return to this jurisdiction, a little more than a month after appellant filed his affidavit of financial status, and about three weeks after appellant's counsel moved for and obtained a continuance—appellant moved for another continuance asserting that he expected to receive funds within a week and that he wished to dismiss his court-appointed counsel and retain counsel of his own choosing.

In view of the number and length of the delays that had already been occasioned by appellant, we think the court acted well within the bounds of its allotted discretion in refusing to grant appellant another continuance. *Cleveland* v. *United States*, *supra*. Furthermore, on the basis of appellant's prior conduct—his refusal to cooperate with his first attorney and his flight from the jurisdiction—we think the court could have reasonably assumed that not only was appellant's motion made in bad faith—that is made not for the purpose of retaining new counsel but for the purpose of further postponing the trial—but that the grounds alleged to support it were in fact fabricated. And indeed it seems this was the case. For about six or seven weeks later, on June 30, 1967, appellant executed and filed in the District Court an affidavit of poverty in support of his request for leave to appeal without prepayment of

costs. Among other things, he averred that he did not have a wife, parent or other person who may be able to assist him in paying the costs of his appeal. In short, within seven weeks after asserting as grounds for a continuance his expectation of receiving funds with which he could retain his own counsel, appellant represented to the District Court not only that he was a pauper but also that he did not have anyone who may be able to assist him financially with his appeal.

IV. The prosecutor's cross-examination of appellant, which elicited from him (1) facts bearing on the circumstances surrounding the alleged fraudulent transaction and his qualifications for doing the work he said was needed and proposed to do and (2) an unsatisfactory explanation of the price he charged for such work, was proper for it was relevant to the issue of appellant's intent to defraud.

(M. Tr. 5-7, 20-23, 31, 40-48; B. Tr. 7, 40)

The indictment charged not only that appellant falsely represented to Miss Merwin that the furnace and chimney in her residence were in need of repairs but also that appellant falsely represented to Miss Merwin that he was a representative of Holland Furnace Company and Ritchie's Heating Company and was authorized by them to service and repair the furnace installed in her residence. At the close of the Government's case, the prosecutor informed the court that the Government would rely only on appellant's representation that the furnace and chimney at Miss Merwin's residence were in need of repairs. Before appellant began presentation of his case, the court instructed the jury of the prosecutor's choice to proceed only on the one representation. (M. Tr. 5-7.)

Pointing to the portions of the indictment which were stricken, appellant complains about the prosecutor's cross-examination which elicited from him (1) the fact that, when he inspected Miss Merwin's furnace and chimney, he was not working for the Holland Gas Furnace Com-

pany and Ritchie's Heating Company (M. Tr. 20-23),[22] (2) an unsatisfactory explanation for his charging Miss Merwin $1171 for the work itemized in the contract (M. Tr. 40-48),[23] and (3) the fact that he did not have a District of Columbia Home Improvement License (M. Tr. 31).[24]

To obtain a conviction for false pretenses it is necessary to prove that the accused harbored an intent to defraud. 32 Am. Jur. 2d, *False Pretenses* § 33. And as one court has put it: "Where intent to defraud is an element of an offense, the trial court may permit a wide latitude of proof." *State* v. *Konop*, 62 Wash.2d 715, 384 P.2d 385, 388 (1963); see 1 WHARTON, CRIMINAL EVIDENCE § 164 (12th ed. 1955). The reason the courts permit a wide latitude of proof was succinctly explained in *People* v. *Taylor*, 220 Cal. App. 2d 212, 33 Cal. Rptr. 654, 657 (1963):

> In the case of a crime involving specific intent, the jury is called upon to determine the existence of such nonobjective fact, i.e., the specific intent or state of mind and must therefore be as completely informed as possible of all the circumstances connected with the offense which manifest such intention.

Proof of intent to defraud may be derived from the circumstances surrounding the transaction involved. See *e.g. United States* v. *Avant*, 107 U.S. App. D.C. 192, 194-95, 275 F.2d 650, 652-53 (1960); *People* v. *Schmitt*, 155 Cal. App.2d 87, 317 P.2d 673 (D. Ct. App. 1957); *Commonwealth* v. *McHugh*, 316 Mass. 15, 54 N.E.2d 934 (1944); see also 1 WHARTON, CRIMINAL EVIDENCE § 164 (12th ed. 1955). It was, of course, relevant to the issue of appellant's intent to determine if he in fact represented the company which either made or installed the furnace he inspected in Miss Merwin's residence. This was particularly true when the prosecutor cross-examined ap-

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[22] Appellant's Brief at 25.

[23] Appellant's Brief at 26.

[24] Appellant's Brief at 27.

pellant, for Miss Merwin had previously testified that appellant had told her, when he came to her premises, that he represented the Holland Gas Furnace Company (B. Tr. 7, 40).

So, too, proof of intent to defraud may be derived from an accused's inability to explain the price he charged for work which, so it was alleged and subsequently proved, was not needed.[25] See e.g. *People* v. *Schmitt*, 155 Cal. App.2d 87, 317 P.2d 673, 689 (D. Ct. App. 1957); cf. *State* v. *Singleton*, 85 Ohio App. 245, 87 N.E.2d 358, 368 (1949). And similarly relevant on the issue of intent was appellant's qualifications to do the job he said was needed and proposed to do himself through his employees. In short, we do not think appellant's complaints about the prosecutor's cross-examination are well taken, for they are bottomed on the mistaken assumption that the prosecutor was limited by the allegation of the misrepresentation in the indictment and could not elicit evidence on the circumstances surrounding the misrepresentation which was relevant to one of the elements of the offense charged.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JOEL M. FINKELSTEIN,
Assistant United States Attorneys.

[25] We note that there was no objection below to this line of cross-examination.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 289791 590

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT L. MATHIS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 21,454

PETITION FOR REHEARING EN BANC

Comes now the appellant by his attorney, Jerome J. Dick, appointed by the Court, and respectfully requests this Court to rehear this appeal en banc; and in support thereof, he states as follows:

1. On April 17, 1968, a division of this Court handed down its opinion and order affirming the conviction of appellant for false pretense.

2. Appellant was convicted of false pretense which involved an alleged misrepresentation that a chimney needed repairs. On March 2, 1964, the date of said misrepresentation, the complainant delivered to appellant two checks postdated to March 7, 1964, one for $800.00 and one for $371.00. Complainant issued an order stopping payment of

the checks on March 3, 1964. There was no testimony showing that there were sufficient funds in the complainant's checking account to cover payment of the checks or that complainant was financially responsible.

3. The Government had the burden of proving that the appellant had obtained something of the value of $100.00 or upward from the complainant at the time the transaction was completed. 22 D. C. Code §1301 (1967 Edition), Ciullo v. U. S., 117 App. D. C. 31, 325 Fed. 2d 227.

4. As stated in the Court's opinion of April 17, 1968, "During a colloquoy following appellant's motion for acquittal after all the evidence, the judge indicated that he proposed 'to instruct the jury . . . that the execution and delivery of checks . . . by the complainant . . . in the amounts of $300 and $371, would constitute something of value in excess of $100.' M. Tr. 98-99." It is clear as a matter of law that the presumption is that the maker of a postdated check has an inadequate fund in the bank at the time of giving such a check. 10 C. J. S. 412. Despite the fact that this presumption had not been rebutted, the Trial Judge ruled that he would take the issue of value away from the jury.

5. The Trial Judge in his instruction to the jury with respect to the element of value stated:

> In connection with the fifth and sixth elements (that defendant obtained something of value and that the value of the property so obtained was $100 or more) that I have just mentioned, you are instructed that the Government must prove beyond a reasonable doubt these elements and that the execution and delivery of checks by the complainant in this case in the amount of $800 and $371 respectively, if the Government has proved such beyond a reasonable doubt, would constitute something of value in excess of $100."

It was appellant's contention that the instruction in effect told the jury that if it found the checks had been executed and delivered it must find that the checks exceeded a value of $100.00. The Government contended that this was not the case.

6. The Court's opinion with regard to the Judge's instruction as to value stated, "It is not clear to us which of these alternatives the judge intended." The Court then went on to hold that ". . . despite an obvious ambiguity in the charge, even if the jury construed the instruction as taking the value issue from them . . ." the Court could find no prejudice to appellant because the two checks had been endorsed by him and he had received the approximate face value of his checks from his bank when he deposited them at a later date.

7. It is submitted that the decision of the Court on this issue was in error for the following reasons:

A. The two checks deposited by appellant "bounced" because of the stop order issued by the complainant, although this is not shown in the record. Moreover, how can the depositing of a bad check in the payee's account give value to such a check? The only factors upon which the value of a check can be based are the proceeds in the drawer's account and his financial responsibility. In the present case, there was no such evidence introduced by the Government to meet its burden of proof. The presumption that the drawer of a postdated check does not have sufficient funds in his account was not rebutted.

B. In any event, the deposit of the checks at a subsequent date is irrelevant. The Government must prove that an article in excess of the value of $100.00 was secured at the time of the transaction, so that the issue was whether or not the two postdated checks had a value in excess of $100.00 at the time they were delivered to the appellant. Thus, as this Court has held on many occasions, if a person giving up an asset in reliance upon a false representation is subsequently reimbursed, the crime of false pretense has still been committed because

there was value obtained at the time of the misrepresentation. See Gilmore v. U. S., 106 App. D. C. 344, 273 Fed. 2d 79. At the time the postdated checks were delivered to appellant, there was no evidence to show that the checks did have a value in excess of $100.00; and at least the issue of value should have been presented to the jury.

8. In view of the above, it is respectfully submitted that appellant's petition for rehearing en banc should be granted.

Respectfully submitted,

Jerome J. Dick
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(Appointed by the Court)
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CERTIFICATION OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

Jerome J. Dick
Attorney for Appellant
(Appointed by the Court)